



# FARMWORKER LEGAL SERVICES

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## ISSUE BRIEF

### Farmworker Health and Safety Compromised by Lack of Enforcement by the Michigan Occupational Safety and Health Administration (MIOSHA)

Each year, farmworkers toil in Michigan fields under extreme conditions. Their workplaces often lack basic sanitation such as clean toilets and hand-washing facilities. They often lack cool drinking water on the hottest of summer days. By law, farmworkers are protected from these hazardous working conditions; but in practice, legal protections are too often lacking. Many employers simply flout the law without consequence.

The Occupational Safety and Health Act of 1970, and corresponding federal regulations, establish the minimum field sanitation standards for protecting agricultural field workers. See 29 CFR §1928.110. The Michigan Occupational Safety and Health Act of 1974, as amended by Act 105 of the Public Acts of 1991, incorporates the federal standard into state law, and expands coverage to all agricultural employers, where at least one hand laborer is present. See §14n (2) and (3).

Michigan's Occupational Safety and Health Administration (MIOSHA) is responsible for enforcing the field sanitation standard in Michigan. However, lack of timely and consistent enforcement by MIOSHA encourages employer noncompliance which results in agricultural work environments that are hazardous to farmworkers and the general public.

MIOSHA's lax enforcement results in relatively few of Michigan's estimated 45,000 migrant and seasonal farmworkers being provided the minimum health and sanitation protections intended by the legislature. One glaring example is MIOSHA's consistent failure to timely and adequately enforce field sanitation rules requiring that employers provide drinking water, at no cost to workers, in the fields. The lack of cool drinking water is a life-threatening hazard on Michigan's hot summer days, and constitutes an "imminent danger" as defined by MCL §408.1005(3): "Imminent danger means a condition or practice in a place of employment which is such that a danger exists which could reasonably be expected to cause death or serious physical harm either immediately or before the imminence of the danger can be eliminated through the

enforcement procedures otherwise provided." According to the inspection priorities set forth by OSHA, cases of imminent danger should be given first priority, and investigations should be scheduled immediately. See OSHA Field Inspection Reference Manual CPL 2.103 §§ (B)(3)(a) and (C)(5)(b).

The failure of an agricultural employer to provide drinking water should also be considered a "serious violation," meaning: "a violation of the act...for which a substantial probability exists that death or serious physical harm could result from the violation or from a practice, means, method, operation, or process, which is in use, unless the employer did not and could not, with the exercise of reasonable diligence, know of the presence of the violation." MCL §408.1006(4).

For two decades MIOSHA has been responsible for enforcing the drinking water provision. Over time, migrant advocates have documented a significant deterioration in MIOSHA's inspection and investigation of field sanitation violations. In 1996, a typical anonymous complaint alleging the lack of drinking water in the fields was personally investigated by an Industrial Hygienist within a few days. Given the ongoing movement of hand-harvest work sites, even this response was often ineffective in fully protecting migrant workers.

By 2001, the typical MIOSHA response time for initiating investigation of "no drinking water" complaints had lengthened to *three weeks*—a disturbingly long period for such a life-threatening hazard. In the summer of 2005, MIOSHA delayed a *full month* before investigating a complaint of a lack of drinking water in the fields, as Michigan was experiencing some of the hottest daytime temperatures in decades, and despite the fact that this was the second complaint in two years filed against the same willful violator. Even then, MIOSHA's enforcement consisted only of a written notice stating, "...we do not intend to conduct an inspection at this time" and requesting that the employer investigate the complaint himself and report the results of such "investigation."

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In 2006, as a result of migrant advocates' growing concern over MIOSHA's failure to timely and effectively respond to field sanitation complaints, the statewide Interagency Migrant Services Committee (IMSC)—a group consisting of migrant service providers and federal and state enforcement agencies, including MIOSHA—initiated a Referral Protocol to facilitate prompt investigation of field sanitation complaints referred to MIOSHA by member agencies. This protocol, outlined in an April 17, 2006 memorandum, clarified MIOSHA procedures for accepting referrals and enforcing field sanitation rules in agricultural operations. According to the agreed protocol, migrant service staff would refer complaints of "serious hazards" to the MIOSHA "point person" on the IMSC. Although MIOSHA reserved the right to determine the "seriousness" of a hazard on a case-by-case basis, there was a consensus that the combination of an employer's failure to provide suitable drinking water, and a heat index in the 80's, constitute an "imminent danger" to workers due to the high potential for heat stress illness or serious injury.

Two migrant seasons have passed since the inception of the IMSC Referral Protocol, and MIOSHA's response to field sanitation violations has not improved. Rather than conducting prompt in-person inspections in response to such interagency referrals, MIOSHA routinely continues to permit employers to do a "self-inspection" of alleged field sanitation violations, and mail "proof of compliance" to the MIOSHA staff assigned the complaint. During the 2006 and 2007 migrant seasons, migrant farmworker advocates and other enforcement agencies (including FLS, MMLAP, USDOL, and MDA) referred at least seven complaints to MIOSHA. The conditions complained of included unsanitary conditions in the fields and migrant camps, particularly lack of water and/or poor water quality. Of those seven complaints, MIOSHA only initiated investigations (and on-site inspections) in three of them. In three other cases, MIOSHA allowed the employers to perform self-inspections and declare themselves to be compliant. In those cases, it took MIOSHA up to three weeks to even send out the initial notice to the employer. This is in direct contradiction to MIOSHA's Strategic Plan for FY 2004-2008 to: "Initiate 100% of complaint inspections within 10 calendar days." See Objective 3.3A. Still another 2007 referral received "no enforcement action" whatsoever by MIOSHA.

One recent case in which the employer was allowed a "self-inspection" involved a west Michigan apple orchard that did not have bathrooms or water in the fields. The workers were forced to urinate in the fields,

and did not have water to drink or wash their hands. Despite this serious and unsanitary situation, MIOSHA *did not conduct an on-site investigation*. Instead, a letter was sent to the employer instructing the employer to respond within 30 days and to document compliance. The employer responded three weeks later (after the apple season was over) with a terse letter that alleged compliance. MIOSHA accepted the letter as proof of "compliance," and considered the complaint to be closed. This response is particularly alarming in an era of increasing attention to "food safety." The state of Michigan must prioritize the health and safety of working conditions for the farmworkers who come in contact with the food supply. If such concerns are ignored by state health inspectors, both the workers and the general public will be put at grave risk.

These field sanitation health and safety rules are the *minimum* standards required to adequately protect workers. If MIOSHA does not enforce even these minimum standards in cases involving serious violations, then heat-related tragedies and public health epidemics that have befallen other states are likely to occur in Michigan. Below are recommendations for MIOSHA to consider in order to address these concerns.

#### **Recommendations:**

- MIOSHA should promptly investigate referrals from other governmental and non-profit agencies. Such referrals have already been reviewed and screened for likely merit. Therefore, MIOSHA should take these complaints seriously, and act immediately (i.e. schedule an on-site inspection within 48 hours) to alleviate situations of "imminent danger."
- MIOSHA should discontinue its practice of routinely allowing agricultural employers to perform "self-inspections" of their alleged violations, and should schedule prompt on-site inspections (i.e. within 48 hours) of all complaints alleging the existence of an "imminent danger" such as the lack of drinking water when the daily heat index is in the 80's.
- MIOSHA should go on record and publicize to the employer community that it will aggressively enforce the law against employers who put the health and safety of field workers, and the food-consuming public, at risk by willfully violating field sanitation standards.